MEGARUMA SDN. BHD.

v.

YEO KIM CHUA

HIGH COURT BORNEO, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[CIVIL APPEAL NO. KG. 14 OF 1993 (II)]
11 OCTOBER 1993

AGENCY: Plaintiff entering into sale and purchase agreement with first defendant - Plaintiff claiming for balance of purchase price for machinery sold under agreement - Plaintiff alleging that first defendant was agent of second defendant - Whether there was an agency - Whether there was an agency arising out of implied or ostensible authority - Lower Court finding in favour of plaintiff - Appeal against decison of lower Court.

The central issue for determination in this case was whether, by a written agreement, the contract for the sale of a glazed earthing pipe machine was made between the plaintiff and the first defendant as the purchaser or whether it was made between the plaintiff and the second defendant through its agent, the first defendant.

The second defendant contended that it had never entered into any agreement with the plaintiff nor had it authorised the first defendant to act as its agent and further argued that while it did purchase a machine sold by the first defendant to it at the price of RM5,000, the payment was made by a personal cheque made payable to the plaintiff at the request of the first defendant.

The case for the plaintiff is that the second defendant is the principal in respect of the agreement entered into between him and the first defendant.

Held:

[1] Looking at the agreement, it was written to the effect that the said machine was to be sold to the first defendant. The agreement was signed by the first defendant as purchaser and not by the first defendant acting on behalf of the second defendant as purchaser. In the circumstances there is nothing expressly stated in the agreement itself to suggest that the first defendant was contracting on behalf of the second defendant so as to constitute the first defendant as an agent of the second defendant.

[2] However, agency may be created ostensibly, i.e. by the principal holding out to the third party that the agent had authority even though in fact he had none. From the evidence, the first defendant is not a director or shareholder of the second defendant. If the Managing Director (DW1) of the second defendant was present at the signing of the agreement, as alleged by the plaintiff, there is nothing to suggest, by words or conduct, that he represented to the plaintiff that the first defendant had authority to act on behalf of the second defendant.

[3] There is nothing in evidence to suggest that DW1 was in collusion with the first defendant to cheat the plaintiff by issuing a false name card, as alleged by the plaintiff. If at all DW1 was in collusion for purposes of cheating, he should be made personally liable and not the second defendant, there being no evidence in rebuttal to the averment that the second defendant was not in existence at the time the agreement was entered into. In the circumstances, there was no evidence of holding out and the plaintiff has failed to establish the liability of the second defendant in respect of the agreement.

[4] While the decision of the learned Sessions Court Judge revolves esssentially on facts, she had misdirected herself on the evidence as a whole. As the Court was satisfied that the learned Sessions Court Judge had not taken proper advantage of her having seen and heard the witnesses, the matter became at large entitling the appellate Court to interfere.

[Second defendant's appeal allowed. Order of lower Court set aside. Costs here and below to the second defendant, to be taxed unless otherwise agreed].

Case referred to:
Watt or Thomas v. Thomas [1947] 1 A11 ER 582 at 587 ***(refd)***

For the appellant - Stanley Eddy; M/s. Battenberg & Talma
For the respondent - Bexter Michael; M/s. Ee & Lim

JUDGMENT

Haji Abdul Kadir bin Sulaiman J:
This is an appeal by the 2nd defendant from the decision of the learned Sessions Judge giving judgment for the plaintiff who is the respondent in this appeal arising out of the claim by the plaintiff for the sum of RM40,000 purportedly being the balance of the purchase price of a glazed earthing pipe machine under an agreement dated 30 March 1984 (Ex. P1). According to the statement of claim, the claim against the 1st and the 2nd defendant is in the alternative i.e. as against the 1st defendant, for the sale of the said machine to him and, as against the 2nd defendant, for the sale of the said machine to it through the 1st defendant who acted as its agent. At the hearing the plaintiff opted to proceed only against the 2nd defendant as the principal of the 1st defendant.

It is not in dispute that the said machine was sold by the plaintiff as evidenced by the official receipt dated 19 July 1984 issued by the plaintiff for the sum of RM5,000 being part payment of the sum of RM45,000 being the cost of the said machine as stipulated in the said agreement. As the balance of RM40,000 was not forthcoming, the plaintiff sued in the action for the amount.

The central issue is to determine whether by the agreement, the contract for the sale of the said machine is made between the plaintiff and the 1st defendant as the purchaser or is made between the plaintiff and the 2nd defendant through its agent, the 1st defendant. If in the former, the 2nd defendant is not liable and if in the latter, the 2nd defendant is liable through the act of its agent. In the Court below, the issue was clouded by the introduction of evidence by the defence of the 1st defendant selling another machine to the 2nd defendant. The evidence was led in to explain the reason for the issuing of the cheque for RM5,000 to the plaintiff resulting in the official receipt given in the name of the 2nd defendant.

The agreement titled the sale and purchase agreement (Ex. P1) recites as follows:

Sale and Purchase Agreement

> Yeo Kim Chua (Seller) hereby agrees to sell the undermentioned machine to Mr. Goh Yong Seng, Name of, Company, Megaruma Sdn. Bhd. (hereinafter referred to as the Purchaser) and both parties agree and sign this agreement hereunder.

Yeo Kim Chua is the plaintiff, Goh Yong Seng is the 1st defendant, and Megaruma Sdn. Bhd. is the 2nd defendant. The agreement was signed by the plaintiff as the seller and 1st defendant as purchaser. The witness to the agreement is Bong Sie Chang. The 1st defendant is not a witness in the trial in the Court below. For the plaintiff, the plaintiff himself (PW1) and Pong Sie Chang (PW2) and for the 2nd defendant, its Managing Director (DW1) and his brother (DW2) gave evidence. At the end of the day, the learned Sessions Judge gave judgment against the 2nd defendant in favour of the plaintiff in the sum prayed with interest thereon at 8% p.a. from the date of judgment till full settlement and costs to be taxed, if not agreed. It is against this decision of the Court below that the 2nd defendant appeals.

The 2nd defendant's defence is basically:

(a) that it had never entered into an agreement with the plaintiff nor had it authorised the 1st defendant to act as its agent. (Paragraphs 1 and 2 of the statement of defence).
(b) that it did purchase a machine sold by the 1st defendant to it at the price of RM5,000. The payment was made by its cheque payable to the plaintiff at the request of the 1st defendant. (Paragraph 4 of the statement of defence).

The case for the plaintiff is that the 2nd defendant is the principal in respect of the agreement entered into between him and the 1st defendant whilst the 2nd defendant says that it has

nothing to do with the agreement. The agreement is between the plaintiff and the 1st defendant personally and nothing more. Looking at the agreement exhibited as P1 there is nothing explicit to suggest that the 1st defendant is contracting on behalf of the 2nd defendant. According to the evidence, the name of the company Megaruma Sdn. Bhd. in the agreement was filled up by the plaintiff at the time of the signing of the agreement. The agreement was prepared by PW2 at the request of the plaintiff and the 1st defendant. PW2 stated that when they approached him to prepare the agreement, the 1st defendant told him that he was representing Megaruma Sdn. Bhd., the 2nd defendant. Though as he said, he did not write the 2nd defendant's name into the agreement because he did not know how to write it, one would expect the agreement to be written in such a way so as to convey the information that the 1st defendant was acting on behalf of someone. But instead it was written by PW2 to the effect that the said machine was to be sold to the 1st defendant. Secondly, the agreement was signed by the 1st defendant as a purchaser and not the 1st defendant acting on behalf of the 2nd defendant as a purchaser. So, from the agreement itself there is nothing expressly stated to suggest that the 1st defendant was contracting on behalf of the 2nd defendant so as to constitute the 1st defendant as an agent of the 2nd defendant.

However, agency can exist by implication or ostensibly giving the benefit that the agreement was prepared by a lay person like PW2. On the implied agency, according to PW1, on the material date the 1st defendant came with his nephew, DW1. The 1st defendant told him that the former and his nephew, wanted to construct one clay pipe factory and they needed a clay pipe machine. The 1st defendant told him about a firm Megaruma Sdn. Bhd. He did not know the 1st defendant's nephew at that time. On Megaruma Sdn. Bhd., we have the evidence of DW1, its Managing Director, which the learned Session Judge considered though at the end of the day she preferred the evidence of the plaintiff as against that of DW1. According to the evidence of DW1, around March 1984 he intended to start his own factory and so he bought a machine from the 1st defendant for RM5,000 which the 1st defendant inherited from his father, the owner of Song Ang Pipes and Brickmaking Factory. He planned to set up his own company through the purchase of an existing company. Negotiations for the purchase started sometime in February 1984 and was finalised in June 1984. His company, known as Megaruma Sdn. Bhd. became fully operational at the end of 1984. So, based on his evidence, by March 1984 when the agreement was executed, this company was not yet in existence. So, how could the 1st Defendant contract on behalf of a principal which did not exist. But there is this issue of the initial payment of RM5,000 for the said machine by cheque and the official receipt (Ex.P2) issued in favour of the 2nd defendant. The explanation for that is to be found again in the evidence of DW1. As was stated earlier, DW1 bought a machine from the 1st defendant for RM5,000. DW1 stated that he wanted to pay for the price by cheque. But the 1st defendant asked him to issue the cheque in the name of his friend, the plaintiff, with whom the 1st defendant had owed some money, and DW1 obliged. This cheque is a personal cheque and not a company's cheque. There is in evidence that this cheque was postdated to July 1984. For that reason, the plaintiff said he issued the official receipt only on 19 July 1984. Unfortunately, this cheque is not tendered as evidence. So the evidence of DW1 is to be accepted that it is a personal cheque. No receipt was given by the 1st defendant to DW1 in respect of the payment. When the official receipt of the plaintiff (Ex. P2) shown to DW1, his reply was that he had never received or seen it before. So, there is nothing by implication to connect the 2nd defendant with the agreement as a principal.

DW1 is the Managing Director of the 2nd defendant. The plaintiff says he was present together with the 1st defendant when the agreement was reached. He had heard of the name of the 2nd defendant whom he said the 1st defendant was contracting on behalf. He was given a name card by DW1 (Ex. P5). If what he said is true, why was the Managing Director not made a party together with the 1st defendant as purchasers of the said machine if he was not prepared to enter with DW1 alone whom he did not then know. As against his evidence, again we turn to the evidence of DW1. DW1 denied any knowledge of the agreement. He denied his presence together with the 1st defendant as alleged as he had never met the plaintiff before the trial of this case. He denied ever giving his name card to the plaintiff as alleged as he started to print his name card only at the end of 1984. Again, no implication can safely be drawn that the 2nd defendant was the principal in respect of the agreement.

The plaintiff tendered another cheque (Ex. P3) as evidence in support. The cheque was dated 30 July 1984 for RM52,000. There is nothing in the cheque to suggest that it was issued by a company let alone by the 2nd defendant. There was only the signature of the drawer. It is issued to the plaintiff. The plaintiff explained that the sum of RM52,000 was for the payment of RM40,000 being balance for the price of the said machine and in respect of two other machines which the 1st defendant purchased from him. The cheque was handed to him by the 1st defendant. However, this cheque was never presented for payment. According to DW1 this cheque belonged to a firm known as Hy-Q Engineering which he owned. He admitted issuing the cheque for the purpose of the 1st defendant. As to the reason why it was issued in the name of the plaintiff, DW1 explained that this was done again at the request of the 1st defendant. The 1st defendant wanted the cheque from him in return for cash which the 1st defendant promised to give him in a few days. DW1 told the 1st defendant that he would not put in the firm's chop on to the cheque until he received the cash promised by the 1st defendant. As no cash was forthcoming, the cheque remained unchopped with the firm's name and for that reason it was never banked in. So, there is no evidence from this cheque that the 2nd defendant has anything to do with the agreement.

As stated earlier, agency may be created ostensibly, i.e. by the principal holding out to the third party that the agent has authority even though in fact he has none. From the evidence, the 1st defendant is not a director or shareholder of the 2nd defendant. If the Managing Director of the 2nd defendant was present at the signing of the agreement, there is nothing to suggest by words or conduct that he represented to the plaintiff that the 1st defendant has authority to act on behalf of the 2nd defendant. As to the name card, there is nothing inherently incredible in the evidence of DW1 that his name card came into existence only at the end of 1984 for it was by then that the 2nd defendant was in operation. There is nothing in evidence to suggest that DW1 was in collusion with the 1st defendant to cheat the plaintiff by issuing a false name card. Even then, the 2nd defendant cannot be made liable when by that time it was non-existent. If at all DW1 is in collusion for purposes of cheating then he personally should be made liable and not the 2nd defendant. There was no evidence in rebuttal by the plaintiff that the 2nd defendant was in fact in existence at the time the agreement was entered into. So, for that reason the 2nd defendant cannot be made liable ostensibly. For the above reason, the plaintiff has failed to establish the liability of the 2nd defendant in respect of the agreement.

The decision of the learned Sessions Judge revolves essentially on facts. Generally, an appellate Court is slow in disturbing the findings of the lower Court on the question of fact. This is so because the trial Court has an advantage over the appellate Court in having seen and heard the witnesses giving evidence before it compared to the appellate Court called upon to make decisions based on the printed evidence. However, if the trial Court misdirected itself on the evidence before it or as Lord Thankerton in *Watt or Thomas v. Thomas* [1947] 1 All ER 582 at 587 said that the appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, the matter will then become at large for the appellate Court. It is the finding of the learned Sessions Judge that she believes that the plaintiff owned the said machine the subject-matter in the agreement. She had reservations as to the credibility of DW1 who said that the machine belonged to 1st defendant. The dispute here is not over the identity of the machine which in any event was never produced as evidence. The issue is whether the 1st defendant was contracting to buy the plaintiff's machine as agent for the 2nd defendant so as to make the 2nd defendant liable for the balance of the purchase price. The evidence about the 2nd machine brought in by DW1 was to explain his involvement in the issue of the cheque for RM5,000 to the plaintiff. As she was confused over the issue she was led to believe that the plaintiff's machine was sold and delivered to the 2nd defendant. In any event she has failed to consider the status of the 2nd defendant, a company, at that material time and whether the cheque belonged to the 2nd defendant or whether it was the personal cheque of DW1 who happened to be the Managing Director of the 2nd defendant when the company came into existence. She has accordingly misdirected herself on the evidence here.

As a second issue, the learned Sessions Judge addressed her mind on the agency status of the 1st defendant. She held that the 1st defendant was the agent of the 2nd defendant because the 2nd defendant gave a cheque of RM5,000 to the plaintiff based on the admission of DW1 that he issued the cheque, and a receipt for that amount was issued by the plaintiff to the 2nd defendant. She disbelieved the evidence of DW1 as to the purpose of the issuing of the cheque by him because there is no evidence that the 1st defendant was indebted to the plaintiff. It is difficult to understand her reasoning here, as was explained by DW1 in his evidence that at the request of the 1st defendant, the cheque which he meant for purpose of paying for the price of a machine which he bought from the 1st defendant was made payable to the plaintiff as the 1st defendant owed money to him. This sort of arrangement happens quite frequently among small business communities where cheques are being made out in that manner. It is not for DW1 to establish the nature of the debt the 1st defendant had with the plaintiff. So long as the debt between him and the 1st defendant is settled, he is contented with the arrangement.

The learned Sessions Judge disbelieved DW1 when he said that the cheque for the RM5,000 was his personal cheque in the light of paragraph 4 of the statement of claim *(sic),* statement of defence of 2nd defendant which "specifically pleaded that the cheque for RM5,000 was issued by defendant 2 and this is supported in the receipt". At any rate, the evidence of DW1 was never challenged when he testified that his personal cheque and not the 2nd defendant's cheque was issued, and the learned Sessions Judge failed to consider the existence or non-existence of the 2nd defendant at the material time. There is also no reason given by the plaintiff as to the non-production of the said cheque, to establish his case that the 1st defendant was the agent of the 2nd defendant. Another point is that, the said paragraph 4 explains the reason for the issue of the cheque which is confirmed by DW1 in his evidence in Court. For failing to consider the evidence on this issue as a whole, the learned Sessions Judge has misdirected herself on the evidence.

Lastly, while agreeing that there is no connection between the 1st defendant and the 2nd defendant that would show that the 1st defendant was acting as the 2nd defendant's agent, the learned Sessions Judge again has fallen into error when she held that there was ample credible evidence to show that the 1st defendant was acting on behalf of the 2nd defendant with the knowledge of DW1. For that reason she held the 2nd defendant liable.

For the reasons given above, I allow the appeal by the 2nd defendant and set aside the order of the learned Sessions Judge and order that the costs here and in the lower Court be borne by the plaintiff, to be taxed, unless agreed. Appeal allowed.